

¹ Public Notice, *Pleading Cycle Established for Comments on BellSouth's Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Such Services to CLEC Voice Customers*, WC Docket No. 03-251 (Dec. 16, 2003); *Order*, WC Docket No. 03-251 (Dec. 30, 2003).

in effect, competitive carriers are often unable to compete for or retain customers in the many circumstances where BellSouth is the only carrier able to provide broadband DSL service. The state commissions also determined that no legitimate basis underlay BellSouth's practice.

Three of those state commissions now have filed additional comments supporting and explaining their determinations,² and two additional state commissions in BellSouth's region emphasize that they and other state commissions should retain the latitude to examine and act against such anticompetitive activities of BellSouth.³ Competitive carriers have provided additional evidence that BellSouth's practice harms local service competition, and they have established both that the state commissions acted entirely within their proper authority and that no conflict exists between federal law and policies and the state commission orders, which are therefore not preempted.⁴

Other RBOCs and their supporters have filed very brief comments in support of BellSouth's petition for declaratory relief. What is most remarkable, however, about their comments is what they fail to argue and establish. Even though SBC and Verizon also refuse to provide DSL service to CLEC voice customers, they provide no argument or evidence that the state commissions erred in their assessment of either the anticompetitive nature of BellSouth's DSL practices or the absence of any legitimate business objective that might support them. That is, the Commission is presented with an uncontested record: nothing in this proceeding to date

² Louisiana Public Service Commission at 10-18; Georgia Public Service Commission at 1-5; Florida Public Service Commission at 1-2.

³ Alabama Public Service Commission at 1-3; Public Service Commission of South Carolina at 1-5 (seeking denial of BellSouth's petition as unsupported in law even though it declined to prohibit BellSouth's bundling of DSL and voice services).

⁴ *See, e.g.*, Z-Tel Communications at 2-32; MCI at 3-26; Vonage Holding Corp. at 3-20; PACE Coalition at 9-27; Florida Digital Networks, Inc. at 6-27; Cinergy Communications at 4-5.

undermines the state commissions' carefully reasoned and elaborately supported conclusions that BellSouth's practice harms local service competition and is without legitimate business justification.

Two commenters claim that granting BellSouth's petition will enhance deployment of broadband services, but they wildly misstate or misunderstand the incentives created by the state commission orders. Catena Networks, an equipment manufacturer, claims that the state orders will cause BellSouth and other RBOCs to "red-line" states where unbundling is required, but the RBOCs themselves make no such claims – nor could they, given that their DSL deployment is accelerating even as the states restrict anticompetitive practices.⁵ Indeed, as the comments of Vonage Holdings show, granting BellSouth's petition would *impede* development of broadband services and facilities because that action would permit the RBOCs to stifle VoIP services, which are clearly poised to accelerate the development of broadband facilities and services.⁶ Verizon claims instead that the state orders will stunt *CLEC* innovation (which, if true, would be in Verizon's self interests), but this argument rests on a misunderstanding of the incentives that have been identified by the Commission and which the state orders foster.⁷ Where, as under the state orders, the CLEC must secure and pay for the entire loop as an unbundled element, it has unusually great incentives to displace the RBOC as the DSL provider so that it – rather than the RBOC – can capture earnings with respect to that service and portion of the loop. This was

⁵ Catena Networks at 2-6.

⁶ Vonage Holdings Corp. at 3-8.

⁷ Verizon at 11-12.

precisely the Commission's own reasoning when it declined to require sub-loop unbundling in the *Triennial Review Order*.⁸

The other claims by supporters of BellSouth's petition only briefly repeat claims made at greater length by BellSouth – and which are entirely defeated by legal arguments already made by various commenters.⁹ Thus, the state commission orders are clearly authorized as part of the commissions' power over local telephone service competition and over jurisdictionally mixed services. Similarly, in the absence (as here) of any conflict arising from state regulation that negates a federal policy, states are fully empowered to regulate information services. Nor does any such conflict exist between those orders and the *Triennial Review Order* or BellSouth's wholesale tariff. BellSouth and its supporters have vastly overstated the scope of exclusive federal regulation to attempt to undermine state commission orders that are entirely within the state commissions' authority and which, by restricting practices that undermine local telephone service competition, accord completely with the Commission's own policies.

ARGUMENT

I. THE RBOCS HAVE FAILED TO DEFEND THEIR ANTICOMPETITIVE PRACTICES OR TO UNDERMINE THE STATE COMMISSIONS' FINDINGS.

Like BellSouth, SBC and Verizon also refuse to provide DSL service to customers who choose a competitor's voice service, and, like BellSouth, SBC does so in the face of several state

⁸ Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 16978, at ¶¶ 258, 260 (2003) ("*Triennial Review Order*").

⁹ See, e.g., Comments of AT&T and the CompTel/ASCENT Alliance at 5-38 ("AT&T Comments").

commission orders.¹⁰ Yet SBC and Verizon – and USTA and other commenters supporting BellSouth’s practices – nowhere defend or establish the legitimacy of their own or BellSouth’s practices or attempt to undermine the evidence and reasoning of the Kentucky, Georgia, Louisiana, and Florida commissions regarding how the DSL bundling policy harms local service competition.¹¹ In contrast, the comments of the state commissions further buttress and explain the findings of the commissions in those orders.¹²

Given the seriousness of the state commission findings, the RBOCs’ silence is telling and leaves uncontested many of the key points in this proceeding. The RBOCs and their supporters provide no basis to question the factual and technological bases for the state commission orders. Nor could they. Although BellSouth initially argued that providing DSL service to CLEC UNE customers presented cost and technological difficulties, the state commissions soundly rejected those claims. Even BellSouth did not in its petition defend its practice or point to technological impediments to complying with the state commission orders. Qwest’s own practices, which provide for DSL service even to voice customers served by CLECs over UNE lines, confirm that the state commissions were correct. Qwest itself is conspicuously absent from these proceedings.

¹⁰ See *Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Indiana Bell Tel. Co. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, No. 40571-INT-03 (Ind. URC Nov. 20, 2000); *Petition for Arbitration to Establish an Interconnection Agreement Between Two AT&T Subsidiaries, AT&T Communications of Wisconsin, Inc. and TCG Milwaukee, and Wisconsin Bell, Inc.*, No. 05-MA-120 (Wis. PSC Oct. 12, 2000); *Application for Approval of the Interconnection Agreement Between Wisconsin Bell, Inc. and AT&T Communications of Wisconsin, LP*, No. 05-TI-656 (Wis. PSC July 11, 2002).

¹¹ See Verizon at 1-15; SBC Communications at 1-5; USTA at 1-3; see also BellSouth Request for Declaratory Ruling at 10-32.

¹² See *supra* nn. 1&2.

Similarly, the Commission has no basis before it to question the state commissions' conclusions that the RBOCs were pursuing their DSL practices in order to achieve, and did achieve, the "lock in" effect that so harms local service competition. BellSouth had earlier indicated that there was no profit at which it would offer DSL services to CLEC UNE voice customers – absent a state commission order.¹³ Even then, BellSouth still refuses to comply with its obligations.¹⁴ The commenters supporting the BellSouth petition point to no legitimate basis for the RBOC DSL practice, and they do not confront or attempt to undermine the state commissions' findings that BellSouth's (and thus their) practices are anticompetitive in two respects: through the "lock in" effect resulting from the burden that switching DSL providers imposes on voice customers that would switch from BellSouth's service to a competitors' voice service, and through the RBOC position, in many areas and circumstances, as the only telecommunications carrier that can provide a bundle of local voice and DSL service.¹⁵ Indeed, the anticompetitive practice creates such significant benefits for BellSouth in the local telephone market that it has indicated that it will deliberately not comply with the state orders at least until the conclusion of these proceedings.¹⁶

¹³ See AT&T Comments at 11-12.

¹⁴ See, e.g., Declaration of Sarah DeYoung (AT&T Comments, Attachment A); Declaration of Janet Ahlfeld (attached hereto as Attachment A).

¹⁵ See AT&T Comments at 5-11.

¹⁶ See *id.* at 12 & n.17, Attachment A (BellSouth officials' claims and BellSouth practice); see also Declaration of Janet Ahlfeld (Attachment A) (describing BellSouth claims in the course of denying service to a potential DSL customer).

II. REJECTION OF BELL SOUTH'S REQUEST, NOT GRANTING IT, WOULD INCREASE INCENTIVES TO DEVELOP BROADBAND FACILITIES AND SERVICES.

Two commenters claim that granting BellSouth's petition would increase incentives for broadband deployment, but both mischaracterize and fail to address the incentives that both RBOCs and CLECs have to develop and deploy advanced services where state commissions have barred BellSouth's restrictive DSL practices.

Catena Networks, a manufacturer of broadband telecommunications equipment, is the only commenter that argues that the state commission orders will inhibit the RBOCs' deployment of DSL facilities. The RBOCs and BellSouth in particular are unwilling to make such claims regarding their own practices and broadband deployment, which is prudent in light of their ongoing, aggressive expansion of DSL services and the disbelief and disapproval that greeted their threats to slow broadband investment following the release of the *Triennial Review Order*. But in this case, Catena's arguments are so incredible that it is no wonder that even the RBOCs have not endorsed them.

Catena claims that "regulatory disincentives and the growing uncertainty from State commission [rulings] ... have slowed, and in some cases stopped, ILEC investment in new technologies capable of providing advanced broadband services."¹⁷ The only evidence provided is the assertion that the "degree of interest by the ILECs in Catena's broadband technologies varied by State, even where no immediate purchases were forthcoming."¹⁸ Catena warns that "[s]ubscribers in these States are likely to find that they have been 'red-lined' without access to

¹⁷ Catena Networks at 2-3.

¹⁸ *Id.* at 3-4.

telephone company provided broadband services.”¹⁹ These claims are completely undermined by the RBOCs’ own practices. Since the issuance of the first state orders at issue, BellSouth and other RBOCs have accelerated, not decreased, their rollout of DSL services. BellSouth increased its DSL subscribership by more than nine percent in the last *quarter* of 2003 alone and touts to the market its customer gains for DSL service.²⁰ There is no evidence that BellSouth would cease service to DSL customers in four of the largest of its nine states.²¹

Any such reduction, much less cessation, of DSL service would, in any event, only confirm the anticompetitive nature of BellSouth’s practice. The state commission orders do not limit BellSouth’s pricing of its DSL service and ensure that BellSouth can continue to charge to a CLEC voice customer the same, presumably profitable rate that it had imposed upon its own voice customers. Indeed, as canvassed in AT&T’s Comments, BellSouth’s willingness to forgo DSL earnings in order to undermine the legitimate competitive opportunities of CLECs for voice services is the hallmark of an anticompetitive practice.²² Catena confirms that just this anticompetitive motivation underlies the RBOCs’ behavior: it warns that “allowing competitive carriers a ‘free ride’ on the BellSouth investment” will make ILECs “reluctant to make the

¹⁹ *Id.* at 6.

²⁰ See AT&T Comments at 9.

²¹ Indeed, in the four relevant states, the number of DSL customers increased 22 percent during the first six months of 2003, while DSL customers nationwide increased only 18 percent. Cf. FCC, *High-Speed Services for Internet Access: Status as of December 31, 2002*, Table 7 (June 10, 2003), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0603.pdf; FCC, *High-Speed Services for Internet Access: Status as of June 30, 2003*, Table 7 (Dec. 22, 2003), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1203.pdf (noting a DSL line increase of 36% in Kentucky, 23% in Florida, 20% in Georgia, and 17% in Louisiana).

²² See AT&T Comments at 10-11.

necessary investment if they have a lower likelihood of obtaining or retaining subscribers.”²³ While Catena errs in describing the CLECs as securing a “free ride” (because the ILEC retains all DSL earnings and bears no loop cost), it correctly identifies that the ILECs are motivated by the opportunity to “lock in” their voice customers. Of course, this is just the anticompetitive effect that the state commissions appropriately targeted, and maintenance of monopoly rents – rather than DSL earnings – are not a necessary or legitimate basis for the ILECs’ broadband investment and deployment plans.

Comments in this proceeding show that denying, rather than granting, BellSouth’s petition will increase incentives for the development and deployment of advanced broadband services and facilities. As the comments of Vonage Holdings underscore, the RBOCs’ restrictive DSL practices also impede the competitive development of VoIP services as well as competition for more traditional voice telephone services.²⁴ As Vonage notes, “the emergence of a ‘killer’ broadband application” is one of the most important factors that could stimulate broadband usage, and VoIP has a strong claim to being that application.²⁵ By granting BellSouth’s petition, the Commission would ensure that the ILEC monopoly would be maintained to the detriment of robust development of VoIP services, limiting further demand for broadband services – and thus a decrease in the deployment and development of broadband facilities.

In contrast to Catena, Verizon frets that the Commission order will dampen the incentives of *CLECs*, not RBOCs, to develop innovative broadband offerings.²⁶ While Verizon’s unusual

²³ Catena Networks at 6.

²⁴ Vonage Holdings Corp. at 3-7.

²⁵ *Id.* at 4; *see id.* at 4-7.

²⁶ Verizon at 11-12.

solicitude for its competitors may not be particularly credible, Verizon's argument rests in any event on a misunderstanding of the Commission's reasoning about incentives and unbundling. Verizon relies on portions of the *Triennial Review Order* that indicated that if the CLEC were required to purchase the entire loop rather than become entitled to sub-loop unbundling, then its incentives to derive revenue from the entire capability of the loop would increase, leading to greater innovation and development of bundled offerings.²⁷ The Commission thus declined to require unbundling of only the high-frequency portion of the loop.²⁸ Where, however, the CLEC must pay for the entire loop, the incentives desired by the Commission are ensured. Under the state orders, CLECs must continue to pay for the entire loop, and BellSouth's obligations apply (as the heading of its petition indicates) to UNE customers of CLECs. As demonstrated in AT&T's Comments, in these circumstances, the CLECs have an unusually great incentive to develop broadband offerings that will displace the RBOC service; otherwise, they are simply paying for a portion of the loop for which the RBOC – but not the CLEC – secures a return.²⁹ But CLECs only have that incentive if they have the opportunity to compete for the business of the voice customer, and the state commission orders achieve just that result by preventing BellSouth from “locking in” customers, and walling them off from telephone competition, through its DSL disconnection practice.

²⁷ See *Triennial Review Order*, 18 FCC Rcd. at ¶ 260; Verizon at 11.

²⁸ See *Triennial Review Order*, 18 FCC Rcd. at ¶¶ 258, 260.

²⁹ See AT&T Comments at 24-26.

III. THE REMAINING ARGUMENTS IN SUPPORT OF BELL SOUTH'S PETITION ADD NOTHING TO POINTS MADE BY BELL SOUTH AND ARE WITHOUT MERIT.

The remainder of the points made by commenters in support of BellSouth's petition simply briefly repeat points made in BellSouth's petition and have been entirely rebutted by the comments of AT&T and others.

For example, Verizon, SBC, and the USTA claim that the state commissions lack authority to issue their orders because the FCC has exclusive jurisdiction over interstate services.³⁰ The sources they cite address rate regulation and exclusively interstate services, and even if the FCC did have exclusive authority over such service (despite the Act's reservation of exclusive authority only with respect to intrastate services, *see* 47 U.S.C. §§ 1 & 2(b)), such authority is not implicated here. Instead, this proceeding involves state commission regulation of local telephone competition and independently rests on the intrastate communications encompassed in the "jurisdictionally mixed" DSL service. As shown in AT&T's Comments (at 16-19), the Supreme Court and leading courts of appeals have repeatedly held that states have power to regulate such jurisdictionally mixed service except in the limited circumstances, not present here, where the Commission can expressly preempt the state commissions. The Commission has plainly not preempted the states, nor is there any "negation" of federal policy that would justify such preemption.

BellSouth's supporters also claim that the state commissions improperly regulated information services or services subject to a federal tariff.³¹ Again, these arguments add nothing to BellSouth's claims, which are without merit. *See, e.g.,* AT&T Comments at 28-37. As

³⁰ Verizon at 13-15; SBC at 2-4; USTA at 2.

³¹ *See* SBC at 4-5; USTA at 2.

leading cases establish, nothing about information services shields them from state regulation in the absence of a conflict that negates a federal policy. And the existence of a federal wholesale DSL tariff clearly has no bearing on the states' regulation of the separate, untariffed DSL retail service and, in the absence of any conflict between that tariff and the Kentucky order addressing wholesale services, does not undermine even the Kentucky order (as a federal court has concluded).³²

Finally, Verizon repeats the BellSouth claim that the states have created a sub-loop UNE in conflict with the *Triennial Review Order*'s list of UNEs.³³ Because nothing in the state orders purported to create or had the effect of creating a sub-loop UNE (the CLEC pays for the entire loop, as BellSouth's petition, styled as applying to CLEC UNE customers, confirms), this argument falters at the starting gate. Even if that were not so, the state orders are entirely consistent with the incentives and policies established by the *Triennial Review Order* and other Commission orders, and no preemption could exist or be justified in the absence of a direct conflict that negates federal policy.³⁴

³² See *BellSouth Telecomms. Inc. v. Cinergy Communications Co.*, __ F. Supp. 2d __, No. CIV.A.03-23-JMH, 2003 WL 23139419 (E.D. Ky. Dec. 29, 2003).

³³ Verizon at 1-2, 5-8.

³⁴ See AT&T Comments at 13-18.

CONCLUSION

For the foregoing reasons, and those contained in AT&T's Comments, the Commission should deny BellSouth's request for declaratory ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2004, I caused true and correct copies of the forgoing Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: February 20, 2004
Washington, D.C.

/s/ Peter M. Andros

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

BellSouth Telecommunications, Inc.

**Request for Declaratory Ruling that State Commissions
May Not Regulate Broadband Internet Access Service
by Requiring BellSouth to Provide Wholesale or
Retail Broadband Services to CLEC UNE Voice
Customers**

WC Docket No. 03-251

DECLARATION OF JANET AHLFELD

1. My name is Janet Ahlfeld. I work and reside at 432 Cardinal Drive, in Satellite Beach, Florida 32937. I am currently an AT&T employee. Since December 2002, I have been a BellSouth local voice service customer, and since March 2003, I have been a BellSouth FastAccess Internet service customer. As a BellSouth FastAccess customer, I have been reluctant to switch my BellSouth local voice service to a competitor because BellSouth would disconnect my DSL service. In light of the recent Florida PUC decision ordering BellSouth not to disconnect customers' DSL service upon switching local service, however, I agreed to switch my local voice service to AT&T.

2. On February 3, 2004, I switched my local voice service from BellSouth to AT&T. As soon as my local voice service was switched, BellSouth disconnected my DSL service.

3. The next day, when I called BellSouth to report my disconnected DSL service, they transferred me from the technical to the billing department. After

discussing my DSL problem, the billing representative explained that BellSouth could not provide DSL service to a customer once she switched local service providers. The entire process took more than 30 minutes.

4. I informed the billing representative that BellSouth's practice to disconnect DSL service for customers who switch voice carriers was contrary to the recent Florida PUC decision. The billing representative was well aware that the Florida PUC had ordered BellSouth not to discontinue its DSL service to customers who switched local voice service to a CLEC. The representative stated, however, that because BellSouth was fighting the Florida PUC decision, it did not intend to comply with the order. According to the billing representative, there was no way for me to switch to local AT&T service and maintain BellSouth DSL service.

5. On February 5, I again called BellSouth's billing department to inquire about my disconnected DSL service. I was told that in order to restore my BellSouth DSL service, I would need to speak with the sales department. When I finally was able to speak with a sales representative, he agreed to issue an order to restore my DSL service by the next day.

6. By February 9, however, I still had no DSL service, and again called BellSouth's FastAccess billing department. This time, the billing representative informed me that my order to restore DSL service had been rejected by AT&T. When I explained that AT&T would not, and could not, reject an order for BellSouth DSL service, the billing representative agreed to issue a second order to restore my DSL service. I was again assured that my DSL service would be restored by the next day.

7. On February 12, I still had no DSL service, so I called the billing department again. The billing representative informed me that both of my DSL orders had been cancelled by BellSouth because my local “service was not compatible with DSL.” I also received a letter from BellSouth, dated February 10, indicating that my DSL service could not be restored because I had another local service provider. *See* February 10, 2004 Letter (attached hereto as Exhibit A). By this time, I had grown frustrated in trying to change my local voice service to AT&T and still maintain my BellSouth DSL service. The process proved confusing and unworkable.

8. On February 12, I again called the billing department to speak about my DSL service problems. Instead of helping me find a solution, however, the representative offered me an incentive to return to BellSouth local service. Because I had been unable to find another solution, I agreed to return to BellSouth local service in order to restore my BellSouth DSL service. I was never able to find a way to switch my local service provider and also maintain my BellSouth DSL service, despite assurances that this would be possible.

9. On February 13, my local lines were restored to BellSouth. Only after I again called BellSouth to inform them that I had BellSouth local service was my DSL service finally restored.

10. BellSouth’s DSL policy proved only to derail my local service change. I felt that BellSouth used its DSL service as a heavy bargaining tool in retaining my voice service. Although I knew that BellSouth was required to provide me with DSL service, even as an AT&T local customer, BellSouth’s processing requirements were too confusing and time-consuming to make such a change worthwhile.

VERIFICATION

I declare under penalty of perjury that the facts stated herein are true and correct,
to the best of my knowledge, information, and belief.

/s/ Janet Ahlfeld
Janet Ahlfeld

Date: February 20, 2004

Exhibit A



Date: February 10, 2004

Janet Ahlfeld
432 Cardinal Dr.
Satellite Beach, FL 32937

RE: DSL Telephone Number 3217730622

Dear Janet Ahlfeld:

We are writing you regarding your order for BellSouth® FastAccess® Internet Service. We have attempted to contact you via phone to notify you of a delay in the provisioning of your FastAccess DSL Service. Unfortunately, we have not been able to reach you. Our records indicate you may have another service (e.g., Different Premis Address (DPA), Watch Alert, Secretarial Services, Ringmaster, Remote Call Forwarding, Prestige, Internet Call Waiting, Multi Line Hunting or some PBX derived lines) attached to telephone number (3217730622) or that you may have made some changes in your local service provider which is preventing us from completing your order for ADSL Internet service. At this time, we will need to cancel your order for ADSL Internet service. Please contact us at 1-888-321-2375, Option 1 (Residential) or Option 2 (Business), then Option 3, if you have questions regarding your order cancellation or contact your local service provider. We are available Monday through Friday from 8:00 a.m. to 8:00 p.m. EST and Saturday from 8:30 a.m. to 5:30 p.m.

Thank you for choosing BellSouth.

For more information about BellSouth services, please visit us at <http://www.bellsouth.com>.

Sincerely,

BellSouth Fast Access Internet Services